

**PROVIDER REIMBURSEMENT REVIEW BOARD  
HEARING DECISION**

2001-D51

**PROVIDER –**  
Leo N. Levi Memorial Hospital  
Hot Springs, Arkansas

Provider No. 04-3001

**vs.**

**INTERMEDIARY –**  
Blue Cross/Blue Shield Association/  
Blue Cros and Blue Shield of Arkansas

**DATE OF HEARING-**

August 16, 2001

Cost Reporting Period Ended -  
December 31, 1983

**CASE NO.** 96-0166

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ISSUE:

Is the Intermediary barred from recovering an overpayment resulting from the issuance of the September 30, 1995 corrected Notice of Program Reimbursement (NPR) for the Intermediary's Notice of Reopening dated January 14, 1987?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Leo N. Levi Memorial Hospital (Provider) is a rehabilitation hospital located in Hot Springs, Arkansas. The year under appeal is December 31, 1983. The following dates and actions are relevant to the Provider's appeal:

- C The Provider filed its December 31, 1983 cost report within the time frame required by Medicare regulations.
- C The Intermediary issued its Notice of Program Reimbursement for the December 31, 1983 cost report on March 27, 1985.
- C The Provider incurred costs in excess of the TEFRA rate of increased ceiling (target costs).
- C Blue Cross and Blue Shield of Arkansas (Intermediary) issued a Notice of Reopening on January 14, 1987, to recover unreimbursed costs due to the lower of costs or charges.<sup>1</sup>
- C The Intermediary recalculated the 1983 cost report on March 2, 1987, and made a tentative settlement on March 25, 1987. In its tentative adjustment, the Intermediary paid the Provider \$7,015 for settlement of the malpractice issue but did not recoup the TEFRA excess cost adjustment even though the recalculation showed that amount in the final settlement.
- C On August 9, 1990, the Intermediary issued a Revised Notice of Program Reimbursement for the 1983 cost report.<sup>2</sup>
- C The Intermediary issued a Revised Notice of Program Reimbursement on September 30, 1995 in which it recouped \$60,917 from the Provider.<sup>3</sup> This recovery was for the TEFRA excess costs adjustment.

The Provider appealed the Provider's September 30, 1995 Notice of Program Reimbursement. The Provider's filing meets the jurisdiction requirements of 42 C.F.R. ' ' 405.1835-.1841. The Provider is represented by Tom Watson, C.P.A. of BKD, LLP. The Intermediary is represented by Bernard M. Talbert, Esquire of Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

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- <sup>1</sup> See Provider Exhibit 1.
  - <sup>2</sup> See Provider Exhibit 2.
  - <sup>3</sup> See Provider Exhibit 3.

The Provider contends that there is an implied requirement for an intermediary to act timely after the issuance of a Notice of Intent to Reopen. This did not occur in this case because the Intermediary waited over 8 2 years to issue a Revised Notice of Program Reimbursement. The Provider believes that is arbitrary and capricious behavior by the Intermediary. The Provider believes that the January 14, 1987 Notice of Reopening constituted a "final determination" by the Intermediary. The Notice of Reopening included all of the components required by 42 C.F.R. ' ' 405.1801(a)(1) and 405.1803(a)(1). It included the reason for the change in the determination of reimbursement, the regulations used by the Intermediary on which it based the reopening, and the reason for the change in determination; that is, the Provider incurred costs over the Tax Equity and Fiscal Responsibility Act (TEFRA) caps. The Notice was issued merely to correct a computation error, i.e., applying the TEFRA cost caps. This is acknowledged by the Intermediary as follows:

[T]he Intermediary did recalculate the cost report at March 2, 1987, shortly after the issuance of the reopening letter. This recalculated cost report reflects the removal of the recovery of unreimbursed cost.. .and agrees exactly to the same settlement page in the cost report used to issue the corrected NPR at September 30, 1995.

Intermediary Position Paper, page 3.

Thus, the Provider believes the Notice of Reopening triggered the statute of limitations both for collection and further reopenings. Any additional action on this cost report must by statute be implemented by March 2, 1990, not September 30, 1995, as the Intermediary tried in this case.

The Provider notes that the Intermediary also issued a Corrected Notice of Program Reimbursement on August 8, 1990, for the 1983 cost report evidently to address the malpractice reopening. As such, the September 30, 1995 Notice was over five years from this notice and clearly barred by statute. Because the Notice of Reopening constituted the final determination by the Intermediary on the TEFRA cost cap issue, 42 C.F.R. ' 405.1885(a) limits the time frame for reopening future reports to within three years of that notice or within three years of the last Notice of Program Reimbursement (August 8, 1990). As such, the federal statutes regarding the statute of limitations for collection must be addressed to see if the Intermediary could recoup the additional amount.

The Provider observes that in Charlotte Memorial Hospital and Medical Center (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 92-0668, March 18, 1999, Medicare and Medicaid Guide (CCH) §80,164 (Charlotte Memorial) the Intermediary made the following argument regarding its ability to recover payments to a provider long after the date of final settlement. It stated that if the Board needs a time limit to consider in this dispute, there is a six-year limit applicable. In making this argument, the intermediary relied on the statutory provisions of 42 U.S.C. ' 1395(g) and the "Judiciary and Judicial Procedure" statute under Title 28. It further argued that the actions to recover overpayments are subject to the statutory provisions of 28 U.S.C. ' 2415 (a).

The Provider observes that the facts in the Charlotte Memorial case involved a recoupment five and one-half years after the issuance of a revised NPR. The Intermediary argued this point to show it was appropriate for the claim in the Charlotte Memorial case to proceed because the six-year statute had not expired. The facts in the instant case are clearly reversed for the Intermediary. The recovery of payments was made eight and one-half years after a notice of reopening was issued which the Provider believes is the final determination in this case. The clear statutory provisions discussed above bar the Intermediary from recouping payments outside of the six-year limitation period.

The Provider further observes that under 28 U.S.C ' 2415 (a) the right of action starts when an intermediary has determined the provider's liability. In the instant case, the Intermediary had completed its audit of the 1983 cost report and knew the amount of the Provider's overpayment as early as January 1987 when it issued its Notice of Reopening, and no later than the date the cost report was

recomputed in March 1987. The fact that the Intermediary waited over eight years to notify the Provider of the exact amount is of no consequence. It knew the Provider had been overpaid in 1987, at which point the statute of limitations began.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that while the Provider does not argue that it did not owe the Program the amount it was overpaid, it contends that it should not be held responsible because of the time elapsed between the date of the reopening letter and the date of the final revised NPR. The Provider states that there is an implied requirement for an intermediary to act timely after the issuance of a Notice of Reopening and asserts that there must be a point at which a cost report becomes final. The Provider further claims that the Intermediary's lack of timeliness will, in the end, be detrimental to the Provider. The Intermediary observes that it was not its intent to allow such a length of time as elapsed in this case between the reopening of the cost report and the issuance of the corrected NPR. However, there were errors made as well as extenuating circumstances. The Intermediary did timely revise the Provider's cost report, but due to the malpractice issue implications, did not finalize the reopening at that point. At a later time, the malpractice issue was finalized, but the cost report revised in March 1987 was not used. The original finalized cost report was once again adjusted, but only for malpractice. Therefore, the issue in question in this case was not covered by the corrected NPR made in 1990 to settle the malpractice issue.<sup>4</sup> In 1995, it was discovered that the January 14, 1987 reopening issue had never been finalized; therefore, a corrected NPR was issued on September 30, 1995.

The Intermediary believes that Eastwood Hospital v. Blue Cross and Blue Shield Association / Memphis Hospital Service & Surgical Associates, Inc., PRRB Dec. No. 86-D118, Sept. 30, 1986, Medicare and Medicaid Guide (CCH) &35,962 (Eastwood) should be a guide in the outcome of this case. In the Eastwood case, almost seven years passed between the issuance of the reopening letter and the corrected NPR. The Board noted that there is no requirement in the law, regulations or program instructions with regard to timeliness pursuant to a notice of reopening under 42 C.F.R. ' 405.1887. The Board also found that the intermediary's actions in the Eastwood case were not arbitrary and capricious due to extenuating circumstances. The Intermediary in this case believes that its actions were likewise not arbitrary and capricious, and in fact, resulted in a benefit to the Provider rather than a detriment, as claimed by the Provider.

The Intermediary notes the issue of detrimental effect is addressed in Woodruff Community Hospital vs. Sullivan, US District Court, Central District of California, No. CV 91-2927. In that case, the provider claimed that the intermediary's delay was unreasonable; and therefore, the provider was entitled to relief to the extent it was prejudiced by the delay. Even though the court found that the intermediary's delay was unreasonable, the provider was not found to be prejudiced by the delay, and thus, not entitled to relief. The Provider in the current case cannot show that it has been harmed by the delay in the issuance of the corrected NPR in question. Just the opposite is true in that the Intermediary's delay created a boon for the provider. This action allowed the Provider to keep funds not rightfully its own for an extended period of time without interest. If any party has been harmed in this case, it is the Medicare Program for not having the use of its own money for the period of the delay.

The Intermediary observes that the Provider cannot and does not deny that it was made aware that it had been overpaid, and that an amount would be due and payable to the Medicare Program. Because more than eight years elapsed from the time of the notification to the provider and the time repayment was demanded, the Provider was allowed to retain the Program's money interest free. It is interesting to note that at no time did the provider offer to repay the Program or question the Intermediary as to why such a delay existed. Had the reopening in question involved a repayment due to the Provider, one

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See Intermediary Exhibit 7.

could reasonably assume that the Provider would not have let so much time pass before questioning the Intermediary.

The Intermediary observes the Provider has also argued that there must be a point at which a cost report becomes final. The Intermediary agrees with that argument noting that had the Provider not appealed the September 30, 1995 corrected NPR, this cost report would have been final long before now. As such, it is only because the Provider has exercised its right to appeal that the cost report is still open.

The Intermediary notes that the facts in Charlotte Memorial, which were accurately reflected in the Board's decision cited, are much different and more complicated than the Provider's appeal. The key facts to consider in Charlotte Memorial is in September 1985, the Intermediary issued a Revised NPR paying the hospital approximately \$300,000. Another revision made in December (2 1/2 months later) did not take into account the \$300,000 payment. As a matter of simple math, the second NPR resulted in a \$300,000 overpayment. After the December 1985 revision, the cost report was kept open to apply the results of judicial review of a Board case from a prior fiscal period to the period that was in issue in the Charlotte Memorial decision. While the resolution of that case was in Charlotte Memorial's favor, the revised NPR implementing the case settlement corrected the double payment made over five years earlier.

The Intermediary notes that in referencing Charlotte Memorial, the Provider is attempting to turn one argument made in that matter against the Intermediary here. The Provider refers specifically to the 42 U.S.C. ' 1395(g), and Title 28 analysis used in that case by the participating Intermediary. The argument is misplaced for two reasons. First, in neither the Administrator's remand of Charlotte Memorial nor the subsequent reissuance of Charlotte Memorial Hospital and Medical Center, (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 2000-D62, June 6, 2000, Medicare and Medicaid Guide (CCH) &80,508 and Administrator's review was the Intermediary's reference to 42 USC ' 1395(g), et. seq., considered in the ultimate affirmance of the recoupment. Second, the Intermediary contends that while the argument cited was appropriate in Charlotte Memorial, it has no application here. The primary point in this case was one of notice, and that was the analogy to the statutes. In a worse case scenario, six years might present an outer limit as to advising a provider of the discovery of an overpayment and initiating recovery. Here, notice was given within two years of the first NPR. The Provider is complaining of an allegedly tardy follow-up, which is a totally different problem from Charlotte Memorial. With the benefit of hindsight, the Intermediary should have acted faster. However, the Provider suffered no injury. As to the equities, the Intermediary asks the Provider to reevaluate its stance based on Board Member Wessman's concurring opinion in Board Decision 2000-D62, cited above. The revised NPR was proper in spite of the time gap.

#### CITATION OF LAW AND REGULATIONS

1. Law: 28 U.S.C:
  - Title 28 - Judiciary and Judicial Procedures
  - ' 2415 (a) - Time for Commencing Actions Brought by the United States
- 42 U.S.C.:
  - ' 1395 (g), et seq. - Payments to Providers of Services
2. Regulations: 42 C.F.R.:

- ' 405.1801 (a) (1) - Intermediary Determinations
- ' 405.1803 (a) (1) - Reasonable Cost
- ' 405.1835 (c) - Right to Hearing Based On Later Intermediary Determination About Reasonable Cost
- ' 405.1885 (a) - Reopening a Determination On Decision
- ' 405.1887 - Notice of Reopening

3. Cases:

Charlotte Memorial Hospital and Medical Center (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 92-0668, March 18, 1999, Medicare and Medicaid Guide (CCH) &80,164.

Charlotte Memorial Hospital and Medical Center, (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 2000-D62, June 6, 2000, Medicare and Medicaid Guide (CCH) &80,508.

Eastwood Hospital v. Blue Cross and Blue Shield Association/Memphis Hospital Service & Surgical Associates, Inc., PRRB Dec. No. 86-D118, Sept. 30, 1986, Medicare and Medicaid Guide (CCH) &35,962

Woodruff Community Hospital vs. Sullivan, US District Court, Central District of California, No. CV 91-2927.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the facts, parties contentions and evidence submitted finds and concludes that the Intermediary properly recovered funds related to a reopening that took place over eight years before the final NPR was issued. The Board finds that there was in deed a reopening of a previously finalized Medicare cost report. Both parties knew that the purpose of the reopening was to apply the TEFRA rate of ceiling cap on Medicare costs, and that a repayment would result. The Board finds that 42 C.F.R. ' 405.1835 (c) is the only regulation which the Provider may use to get relief from an intermediary not completing an NPR timely. However, the Provider in this case did not argue for this type of relief.

Furthermore, the Board notes that the Provider was not prejudiced or disadvantaged by the Intermediary's recoupment of funds. In fact, the Provider did have over eight years of interest free use of the funds. Based on these findings, the Board concludes that the issuance of the issued NPR however late was appropriate, and recapture of funds previously known by both parties was reasonable.

The Board further finds that the statute of limitations does not apply in this case since no final determination was ever made. The statute only applies to finalized NPRs. Finally, the Board finds that the Intermediary was not arbitrary and capricious in waiting over eight years to finalize the cost report. The Board finds that there were extenuating circumstances such as the malpractice issue that delayed its issuance. However, the Board also finds that the Intermediary was remiss and slow in finalizing the NPR. The fact remains, however, that the Provider knew a refund was due to the Medicare Program and could have repaid it before the final NPR was issued.

DECISION AND ORDER:

The Intermediary properly issued an NPR to recover excess costs under TEFRA's rate of ceiling increase. The Intermediary's adjustment is affirmed.

BOARD MEMBERS PARTICIPATING:

Irvin W. Kues  
Henry Wessman  
Stanley J. Sokolove

**Date Of Decision:** September 26, 2001

FOR THE BOARD

Irvin W. Kues  
Chairman